UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN FREEDOM LAW CENTER, INC., Plaintiff,	
-v-	No. 1:19-cv-153
DANA NESSEL and AGUSTIN ARBULU, in their official capacities, Defendants.	Honorable Paul L. Maloney

OPINION AND ORDER DENYING MOTIONS TO DISMISS

In a press release dated February 22, 2019, Dana Nessel, the Michigan Attorney General, and Agustin Arbulu, then the Director of the Michigan Department of Civil Rights, announced new initiatives to combat hate in the Michigan. The announcement coincided with the release of the Southern Poverty Law Center's (SPLC) Intelligence Report. The annual Intelligence Report identifies Plaintiff American Freedom Law Center (AFLC) as a hate group. AFLC alleges that new initiatives, the "Policy Directive," targets those groups identified by SPLC as hate groups. AFLC contends the Policy Directive targets it because of its political views, a violation of the First Amendment. AFLC sued Nessel and Arbulu. Defendants filed separate motions to dismiss. (ECF Nos. 12 and 14.) The Court concludes AFLC has standing and the claims are ripe for review. This Court must accept the well-pled facts in the complaint as true, and because the motions to dismiss rest largely on contested facts, the two motions to dismiss will be denied.

I.

AFLC filed a first amended complaint, which operates as the controlling pleading. (ECF No. 7 Compl.) AFLC is a nonprofit, public-interest law firm. (*Id.* ¶ 38 PageID.61.) AFLC primarily exists to defend the First Amendment rights of conservative Christians and Jews. (*Id.*) AFLC pleads that it engages in lawful civil rights litigation and uses various media to promote its activities and viewpoints. (*Id.* ¶ 46 PageID.63.)

AFLC alleges that the new initiative includes "official investigations and surveillance of all the 'hate' groups identified by SPLC that are located in Michigan." (Compl. ¶ 22 PageID.58.) According to AFLC, the Policy Directive was announced through a press release issued by the Michigan Department of Civil Rights (MDCR), which was in part a response to the release of the SPLC's annual report. (*Id.*; *see* ECF No. 7-1 Press Release PageID.71-72.) The Press Release contains a hyperlink to SPLC's Intelligence Report, which lists AFLC as an anti-Muslim hate group.[1] (Compl. ¶ 24 PageID.58.) The Press Release also contains a hyperlink to SPLC's "Hate Map," which also lists AFLC as a hate group in Michigan.[2] (Compl. ¶ 25 PageID.59.)

In the Press Release, the defendants identify actions they will take as part of the Policy Directive. AFLC pleads that Nessel is establishing a hate-crimes unit "to fight against hate crimes and the many hate groups which have been allowed to proliferate in our state." (Compl. ¶¶ 26-27 PageID.59; Press Release PageID.71.) AFLC alleges that, according to a

[1] The Press Release exhibit attached to the complaint does not contain the hyperlink. The specific reference to AFLC within the Intelligence Report is attached to the complaint as a separate exhibit. (ECF No. 7-3 PageID.76.)

[2] Again, the Press Release exhibit does not contain the hyperlink. The Hate Map is attached to the complaint as a separate exhibit. (ECF No. 7-2 PageID.72.)

"spokeswoman for Defendant Nessel, this new unit will investigate any group identified by the SPLC as a 'hate' group."[3] (Compl. ¶ 26 PageID.59.) The Press Release quotes Arbulu stating that more than one half of the groups identified by SPLC are between Flint and Ann Arbor. (*Id.* at 30 PageID.59-60; Press Release PageID.71.) AFLC acknowledges it is located in the Ann Arbor area and is one of the "active hate and extremist groups" identified by SPLC in Michigan. (Compl. ¶ 31 PageID.60; Press Release PageID.71.)

As part of the Policy Directive, the MDCR will establish a database for documenting "hate and bias incidents" in Michigan. (Compl. ¶ 28 PageID.59; Press Release PageID.71.) The incidents to be tracked and documented are instances which do not constitute a crime or civil infraction. (Compl. ¶ 28 PageID.59; Press Release PageID.72.) AFLC contends, under the Policy Directive, "Defendants will conduct surveillance and utilize government resources to covertly gather and share information in order to deter the activities of those individuals and groups deemed to be 'hate' groups by SPLC." (Compl. ¶ 54 PageID.65.) AFLC further contends that no safeguards exist for the use or distribution of the information collected as part of the Policy Directive. (*Id.* ¶ 55 PageID.65.)

AFLC pleads that it has been injured as a result of the announcement of the Policy Directive, which "had and continues to have the intended effect of chilling First Amendment freedoms and tarnishing Plaintiff's public reputation." (Compl. ¶ 32 PageID.60.) AFLC alleges that the Policy Directive chills individuals who would otherwise support AFLC by

[3] The statement is not included in the Press Release.

discouraging any association with AFLC and by discouraging donations to AFLC. (*Id.* ¶ 35 PageID.60.)

AFLC raises three claims in its complaint. All three claims arise from the creation, adoption and enforcement of the Policy Directive. First, AFLC alleges Defendants have deterred AFLC's exercise of free speech which is protected by the First Amendment and the Fourteenth Amendment. Second, Defendants have deterred AFLC's exercise of its right to expressive association, which is also protected by the First Amendment and the Fourteenth Amendment. Finally, by targeting AFLC for disfavored treatment based on its political viewpoints, Defendants have deprived AFLC of the equal protection of the law, which is protected by Fourteenth Amendment. AFLC sued both defendants in their official capacities.[4]

II.

As part of their motions, Nessel and Arbulu generally disagree with the nature and scope of what AFLC refers to as the Policy Directive. Nessel asserts that the Office of the Attorney General does not have a policy of investigating or surveilling groups based on their political views. Nessel maintains that the new hate crimes unit will simply investigate credible tips which will lead to the prosecution of hate crimes. Nessel relies on statements and comments made in press conferences and in press releases other than the press release discussed in the complaint. Arbulu insists he has no criminal enforcement authority. Arbulu

[4] In August 2019, Arbulu was terminated by the Michigan Civil Rights Commission. Under Rule 25(d) of the Federal Rules of Civil Procedure, Arbulu's replacement "is automatically substituted as a party." The Court is unaware if anyone has been appointed to replace Arbulu.

contends the database would be used to develop educational outreach strategies in affected communities.

Nessel requests the Court take judicial notice of several press releases and the statements in those press releases. Judicial notice serves as a substitute for proof or evidence. *See Blytheville Cotton Oil Co. v. Kurn*, 155 F.2d 467, 470 (6th Cir. 1946); *accord Grand Opera Co. v. Twentieth Century-Fox Film Corp.*, 235 F.2d 303, 307 (7th Cir. 1056) ("Judicial notice is merely a substitute for the conventional method of taking evidence to establish facts."). Rule 201 of the Federal Rules of Evidence governs judicial notice. The rule addresses judicial notice of "adjudicative facts." The rule does not address judicial notice of documents or records. *See* Fed. R. Evid. 201 advisory committee's notes to 1972 proposed rules, note to subdivision (a) ("This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of 'adjudicative facts.'"). The rule requires either (1) the fact be "generally known within the trial court's territorial jurisdiction" or (2) the fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1) and (2). Judicial notice is appropriate only if the matter is beyond reasonable controversy. *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 466 (6th Cir. 2014) (citation omitted).

All circuit courts that have considered the question have concluded that a court may take judicial notice of some documents of public record. *Passa v. City of Columbus*, F. App'x 694, 697 (6th Cir. 2005) (collecting cases). But, when a record is judicially noticed, only the fact of the document's existence is established. *Id.* Judicial notice of a record—public, administrative, or other—does not mean that all of the facts contained within the

document are accepted as true. *Id.*; *see e.g., In re Omnicare, Inc. Sec. Litigation*, 769 F.3d at 467 ("Under this standard, we could take notice of the fact that Omnicare filed the Audit Committee Charter and what the filing said, but we could not consider the statements contained in the document for the truth of the matter asserted, even at the motion-to-dismiss stage."); *Davis v. City of Clarksville*, 492 F. App'x 572, 578 (6th Cir. 2012) ("But it is not the existence of these documents that Davis seeks for us to acknowledge; rather he seeks to rely on the substantive facts within those exhibits, many of which are disputed, to support his appeal.").

The Court declines to take judicial notice of statements contained within the various documents referenced by Defendants in their motions. For these motions, the Court does not accept at true the statements contained within the various documents which Nessel has identified for judicial notice. When Defendants reference the exhibits attached to the complaint, the Court can consider the statements made in those exhibits to determine if AFLC accurately represents the statements made by Defendants. For these motions, judicial notice of statements made in documents other than those attached to the complaint is not appropriate. First, the scope of the new Policy Directive is a question of fact. ALFC and Defendants dispute the scope of the new policy, meaning that the facts are disputed and not subject to judicial notice.[5] Second, while the Court may take judicial notice of press releases

[5] Defendants filed their motions in mid-April 2019. Soon thereafter, in separate hearings, Nessel and Arbulu appeared before the State Senate Committee on Oversight. At the Court's request, the parties filed transcripts of the hearings. It does not appear that the testimony presented was sworn testimony. It does appear that the hearings were motivated, at least in part, by the allegations made by AFLC in this lawsuit. Nessel and Arbulu discussed the creation of the hate crimes unit and the database and the purposes of each. The parties filed supplemental briefs addressing the testimony at the hearings. The Court has reviewed the transcripts and supplemental

or the fact that press conferences and hearings occurred, it cannot take judicial notice of their contents.

III.

Defendants filed two motions. Nessel raises three distinct reasons to dismiss the complaint: standing, ripeness and the failure to plead sufficient facts to state a claim. Nessel generally defends the creation of the hate crimes unit. Arbulu largely incorporates by reference the arguments made in Nessel's motion. Arbulu defends the creation of the database. In this section, the Court considers the portions of Defendants' motions that fall under Rule 12(b)(1).

A. Standing

1.

A defendant may challenge standing through Rule 12(b)(1), the mechanism for raising issues with subject-matter jurisdiction. *See, e.g., Stalley v. Methodist Healthcare*, 517 F.3d 911, 916 (6th Cir. 2008) ("We review de novo a district court's dismissal for lack of standing—lack of subject matter jurisdiction—under Fed. R. Civ. P. 12(b)(1)."). When challenged by a motion filed under Rule 12(b)(1), the plaintiff bears the burden of establishing subject-matter jurisdiction. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769, 776 (6th Cir. 2010) (citing *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007)). A motion to dismiss under Rule 12(b)(1) for lack of subject matter

briefs. The Court concludes that the discussion of the Policy Directive at the hearings falls outside the scope of judicial notice. Accordingly, for the purpose of these motions, the Court does not accept, as adjudicative facts, the truth of the statements made by Nessel and Arbulu at the hearings.

jurisdiction may take the form of a facial challenge, which tests the sufficiency of the pleading, or a factual challenge, which contests the factual predicate for jurisdiction. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996) (quoting *Mortensen v. First Fed. Savings and Loan Ass'n*, 549 F.2d 884, 890-91 (3d Cir. 1977)); *see also DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). In a facial attack, the court accepts as true all the allegations in the complaint, similar to the standard for a Rule 12(b)(6) motion. *Ohio Nat'l Life Ins. Co.*, 922 F.2d at 325. In a factual attack, the allegations in the complaint are not afforded a presumption of truthfulness and the district court weighs competing evidence to determine whether subject matter jurisdiction exists. *Id.*

Although Defendants do not clearly identify whether the 12(b)(1) portion of their motions are a facial or factual attack, this Court will treat the motions as a factual attack. Defendants do not accept the factual assertion in the complaint that describe the scope of the Policy Directive. For this portion of the motions, the Court must weigh conflicting evidence and resolve factual disputes; the Court does not have to accept the factual allegations in the complaint.[6] *See Madison-Hughes v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996).

[6] Even though the Court declines to take judicial notice of the contents of the press releases and the hearings, the Court nevertheless could likely consider the statements for the purpose of resolving the portion of Defendants' motions brought under Rule 12(b)(1). Defendants, however, did not attach any of the press releases to their motions. In their briefs, Defendants provide internet addresses, hyperlinks, to each press release. The Local Rules require the parties to submit such documents with their motion. "When allegations of facts not appearing of record are relied upon in support of or in opposition to any motion, all affidavits *or other documents relied upon to establish facts* shall accompany the motion." W.D. Mich. LCivR 7.1(b) (emphasis added).

2.

Article III of the United States Constitution gives federal courts the authority to resolve cases and controversies. U.S. Cont., Art. III, § 2. The party bringing the case or controversy must establish standing to sue. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *Parsons v. United States Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015) ("Courts have explained the 'case or controversy' requirement through a series of 'justiciability doctrines,' including, 'perhaps the most important,' that a litigant must have 'standing' to invoke the jurisdiction of the federal courts.") (citation omitted). The Supreme Court summarized the three elements necessary for standing.

> First, Plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court. Third, it must be likely, as opposed to mere speculative, that the injury will be redressed by a favorable decision.

Parsons, 801 F.3d at 710 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The Supreme Court has set forth basic principles for standing when the plaintiff raises a First Amendment claim. Generally, plaintiffs do not "establish standing simply by claiming that they experienced a 'chilling effect' that resulted from a government policy that does not regulate, constrain, or compel any action on their part." *Clapper*, 568 U.S. at 419; *see United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C.C. 1984) ("All of the Supreme Court cases employing the concept of 'chilling effect' involve situations in which

the plaintiff has unquestionably suffered some concrete harm (past or immediately threatened) apart from the 'chill' itself."). "Allegations of a subjective 'chill' are not an adequate substitute for a claim of a specific present objective harm or a threat of specific future harm[.]" *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). A plaintiff's knowledge of a government surveillance and data-gathering system, and the fear that the government might take some future action using that information, by itself, does not create an actual or imminent injury-in-fact for standing purposes. *See id.* 13-14; *United Presbyterian Church*, 738 F.2d at 1379-80. "[T]he 'chill' on First Amendment expression normally stands as the '*reason* why the governmental imposition is invalid rather than the harm which entitles a party to challenge it.'" *Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 566 (6th Cir. 1995) (quoting *United Presbyterian Church*, 738 F.2d at 1378)).

For the injury-in-fact element of standing, a plaintiff must allege a subjective allegation of a chill with something more; "a claim of specific present objective harm or a threat of specific future harm." *Adult Video Ass'n*, 71 F.3d at 566 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975)); *see Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 609 (6th Cir. 2008). A plaintiff can establish an injury-in-act for a First Amendment claim by pleading a chilling effect and a reputational injury. *Meese v. Keene*, 481 U.S. 465, 473-76 (1987); *Parsons*, 801 F.3d at 711. For equal treatment claims, the Supreme Court has held that stigmas associated with governmental designations can be the basis of a non-economic injury. *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (involving a challenge to sex-based spousal dependency benefit provisions).

The *Laird* and *Clapper* cases provide insight to situations where the plaintiffs did not have standing, while the *Meese* and *Parsons* cases provide insight to situations where the plaintiffs had standing.

In *Laird*, President Johnson had ordered federal troops to assist local law enforcement with domestic civil disorder. *Laird*, 408 U.S. at 4-5. The military developed a "data-gathering system" which collected information from public sources about situations that had the potential for civil disorder. *Id.* at 6. The plaintiffs alleged their rights were infringed by the Army's surveillance of lawful and peaceful civilian activities. *Id.* at 2. The Court held that the plaintiffs did not have standing because, while the existence of a data-gathering system might chill their First Amendment freedoms, their subjective fears were not a substitute for a specific present objective harm or threat of a future harm. *Id.* at 13-14.

Clapper involved challenges to warrantless wiretapping of telephone and email communication following the attacks on September 11, 2001. President Bush authorized the National Security Agency to conduct surveillance where one party to the communication was located outside the United States and the communication was reasonably believed to involve a member of al Qaeda or another terrorist organization. *Clapper*, 568 U.S. at 1143-44. The plaintiffs challenged 50 U.S.C. § 1881a, which permitted the Foreign Intelligence Surveillance Court to authorize intelligence surveillance of foreign persons outside the United States. *Id.* at 404. The plaintiffs were attorneys and organizations whose work required them to communicate with individuals outside the United States. *Id.* at 406. The plaintiffs believed some of the people with which they communicate would be individuals the Government believed were involved with terrorist organizations. *Id.* The Court held that

the plaintiffs did not have standing because they did not allege an injury-in-fact. *Id.* at 410. The Court explained that the injury rested on a series of speculations about the actions of the various governmental actors. *Id.* at 410-15. At best, the surveillance was authorized, but the plaintiffs could not demonstrate the surveillance would actually occur or that their clients would be targeted. *Id.*

In *Meese*, the plaintiff wanted to show three Canadian films that, under the Foreign Agents Registration Act, met the definition of the term "political propaganda." *Meese*, 481 U.S. at 467. The plaintiff was an attorney and a member of a State senate. *Id.* The three films were distributed by the National Film Board of Canada and covered the subjects of nuclear war and acid rain. *Id.* at 467-68. In addition to alleging a subjective chill on expression, the plaintiff alleged that showing films which met the legislative definition of "political propaganda" would harm his personal, political, and professional reputation. *Id.* at 473-4. The court agreed and found that the allegations of injury to his reputation were sufficient to show injury-in-fact. *Id.* at 473-75.

Parsons involved members of the Juggalos, a loosely-affiliated group of fans of the music group Insane Clown Posse specifically and any Psychopathic Records artists generally. In 2011, the National Gang Intelligence Center identified the Juggalos as a "hybrid gang." *Parsons*, 801 F.3d at 705. Two of individual plaintiffs to the lawsuit were stopped and questioned by the police on separate and unrelated occasions, each time because the individual was displaying Juggalo signs, such as a shirt or tattoo. *Id.* at 707-708. Another plaintiff was in the military, had a Juggalo-related tattoo, and believed that the gang designation placed him in danger of discipline or discharge. *Id.* at 708-09. Two other

plaintiffs were members of the Insane Clown Posse and alleged that a concert was cancelled at the request of the local police because of the gang designation. *Id.* at 709. The Sixth Circuit found that the plaintiffs alleged an injury-in-fact based on the stigma and reputational injuries they suffered along with the allegations that their First Amendment rights were being chilled. *Id.* at 711-12.

3.

AFLC has established the three elements necessary for standing: injury in fact, causation and redressability. While Defendants generally challenge AFLC's description of the scope of the Policy Directive, for standings purposes, AFLC points to the announcement of the Policy Directive. Generally, Defendants argue that the manner in which the Policy Directive will be enforced will not cause AFLC any injury.[7] If true, Defendants might prevail on the merits of each claim at summary judgment or a trial. AFLC has shown, however, that the announcement itself provides a basis to initiate and maintain this lawsuit. By implicitly endorsing SPLC's list of hate groups, which includes AFLC, the announcement of the Policy Directive injured AFLC. Remember, AFLC asserts its activities are entirely lawful.

By referencing SPLC's publications as part of the rationale of the Policy Directive, the Press Release created an injury in fact. SPLC has designated AFLC as a hate group located in Michigan. The Press Release relies on SPLC's reports as evidence of "an increase in active extremist and hate organizations in Michigan." (Press Release PageID.71.) The

[7] The only evidence submitted by Defendants which this Court can consider for the Rule 12(b)(1) portions of the motion are the transcripts of the hearings, hearings which occurred more than two months after the announcement of the Policy Directive.

Press Release calls this evidence a "troubling trend." (*Id.*) Nessel commits the Office of the Attorney General to "stand up to hate in Michigan" by "establishing a hate-crimes unit in my office." (*Id.*) Similar to the enforcement of the statute defining "political propaganda" to describe the films at issue in *Meese*, as representatives of the State government, Defendants' endorsement of the SPLC's list of hate groups constitutes a concrete and particular reputational injury to AFLC.

As evidence of its injury, AFLC submitted an affidavit from its co-President, David Yerushalmi. (ECF No. 24-1 Yerushalmi Aff. PageID.443-47.) Yerushalmi describes how the hate group label injures AFLC. AFLC has to expend resources to combat the label and bolster its reputation. (*Id.* ¶ 6 PageID.444.) The government's endorsement of the label makes that job more difficult. (*Id.*) Although AFLC was not specifically mentioned in the Press Release, it received media inquiries following the Press Release. (Compl. ¶ 33 PageID.60.) The government designation thus injures AFLC both reputationally and financially. (Compl. ¶ 13 PageID.446.) On these facts, the injury created by the Policy Directive is readily distinguishable from the subjective fears held by the plaintiffs in *Laird* and *Clapper*. Defendants have not presented the Court any evidence to counter this affidavit.

AFLC has identified legal authority which, on the facts established with Yerushalmi's affidavit, demonstrate the causation and redressability elements for standing. Defendants cannot control who SPLC labels a hate group. By referencing SPLC's reports as the justification for the Policy Directive, however, for purposes of this motion, Defendants have placed the State's imprimatur on SPLC's list of hate groups in Michigan, which includes AFLC. In *Meese*, the Supreme Court found that the injury to reputation was caused by the

Department of Justice's enforcement of a statute that used the term "political propaganda." *Meese*, 481 U.S. at 476. And, enjoining application of the term "political propaganda" would "at least partially redress the reputational injury[.]" *Id.* Notably, AFLC contends it does not engage in any criminal activity and further contends it has been placed on SPLC's list of hate groups because of its constitutionally-protected activities. Should the Court ultimately affirm this allegation and enjoin Defendants in some manner from applying the Policy Directive to AFLC, the outcome would provide some restoration of AFLC's reputation.

B. Ripeness

1.

Similar to standing, the issue of ripeness concerns the constitutional requirement that federal courts adjudicate only cases and controversies. *Bigelow v. Michigan Dep't of Natural Resources*, 970 F.2d 154, 157 (6th Cir. 1992). Parties may raise ripeness through a Rule 12(b)(1) motion. *See Tri-Corp Mgmt. Co. v. Praznik*, 33 F. App'x 742, 744 (6th Cir. 2002). The ripeness doctrine addresses the timing of a lawsuit so that courts do not prematurely entangle themselves in abstract disagreements. *Thomas v. Union Carbide Agriculture Prods. Co.*, 473 U.S. 568, 580 (1985). If a case or controversy is not ripe, federal courts lack subject-matter jurisdiction and the complaint must be dismissed. *Bigelow*, 970 F.2d at 157. The Sixth Circuit recognized that the Supreme Court has recently cast doubt on the long-standing prudential aspects of the ripeness doctrine. *Kiser v. Reitz*, 765 F.3d 601, 606-07 (6th Cir. 2014) (discussing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) and *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014)).

In this circuit, district courts consider three factors when addressing ripeness concerns: (1) the likelihood that the harm alleged by the plaintiff will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings. *Berry v. Schmitt*, 688 F.3d 290, 298 (6th Cir. 2012) (citation omitted); *Adult Video Ass'n*, 71 F.3d at 568. "Although the ripeness requirement is somewhat relaxed in the First Amendment context, there nonetheless must be a credible fear of enforcement." *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002) (citation omitted).

2.

AFLC has established that its claims are ripe. Defendants' arguments again concern the scope of the Policy Directive and the fact that no specific policies or procedure have been implemented. AFLC focuses on the announcement of the Policy Directive.

AFLC has established both a harm to its reputation and a credible fear that it will be targeted by the State of Michigan under the Policy Directive. The Court has already explained how the announcement of the Policy Directive damaged AFLC's reputation. As pled, AFLC reasonably fears that it will be a target for investigation and surveillance. AFLC pleads that "Defendants publicly announced that they would be commencing official investigations and surveillance of all the 'hate' groups identified by SPLC that are located in Michigan." (Compl. ¶ 22 PageID.58.) The fact that the hate crimes unit is still being established and that it will only prosecute crimes does not undermine AFLC's credible fears of future surveillance. Furthermore, AFLC pleads that the database will not be used to track

actual crimes, but incidents. Thus, even if AFLC is never prosecuted, the information gathered through the surveillance and investigation would be recorded in the database and might be used against AFLC in other ways. Based on the record at this point in the litigation, the reason AFLC has been swept up in this new initiative is because of its legal, constitutionally-protected activities, activities with which SPLC disagrees.

IV.

In addition to challenging the constitutional requirements for a lawsuit, Defendants also challenge the merits of the three claims. Here, the Court addresses the portion of the motions that fall under Rule 12(b)(6).

A.

Under the notice pleading requirements, a complaint must contain a short and plain statement of the claim showing how the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); *see Thompson v. Bank of America, N.A.*, 773 F.3d 741, 750 (6th Cir. 2014). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

To survive a motion to dismiss, a plaintiff must allege facts sufficient to state a claim for relief that is "plausible on its face" and, when accepted as true, are sufficient to "raise a right to relief above the speculative level." *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). "The complaint must 'contain either direct or inferential allegations

respecting all material elements necessary for recovery under a viable legal theory.'" *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) (citation omitted). "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007) (citations omitted). When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. for Bio-Ethical Reform,* 648 F.3d at 369.

B. Claims

1. First Amendment

Defendants argue that AFLC has not pled sufficient facts to support a plausible claim that its speech or its expressive association has been or will be curtailed.[8] For this portion of Defendants' motions, the Court must accept the allegations in the complaint as true. Before continuing, the Court must note paragraph 32 in the complaint. "Defendants public announcement of the policy had and continues to have the intended effect of chilling First Amendment freedoms and tarnishing Plaintiff's public reputation." (Compl. ¶ 32. PageID.60.) Recognizing that Defendants strongly disagree with AFLC's description of the

[8] Defendants do not identify the elements necessary to state or ultimately prove a First Amendment free speech or free association claim. Defendants assume that the fact they identify is a necessary element for the claim AFLC pleads.

new initiative, the Court finds that the complaint pleads a plausible claim that AFLC's free speech has been chilled.

As pled in the complaint, the new policy targets groups like AFLC for disfavored treatment based on AFLC's political views. AFLC maintains that it does not commit crimes, it engages in civil rights litigation and media campaigns. AFLC contends that its conservative views are the reason SPLC has deemed it a hate group. AFLC pleads that "Defendants publicly announced that they would be commencing official investigations and surveillance of all the 'hate' groups identified by SPLC that are located in Michigan." (Compl. ¶ 22 PageID.58.) AFLC has also pled that information gathered by the investigations and surveillance "will be available to Plaintiff's political opponents, and it can be used to harm the operations and activities of organizations deemed to be 'hate' groups, such as Plaintiff." (*Id.* ¶ 55 PageID.65.) AFLC asserts that the hate group label and the surveillance and investigations have a deterrent effect on its activities and on its rights to free speech and expressive association. (*Id.* ¶ 57 PageID.66.) These allegations are sufficient to set forth a plausible claim under the First Amendment.

2. Fourteenth Amendment

Defendants assert AFLC has not adequately pled facts to support a plausible claim under the Fourteenth Amendment.

"To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment . . . burdens a fundamental right, targets a suspect class, or has no rational basis." *Bible Believers v. Wayne Cty. Michigan*, 805 F.3d 228, 256 (6th Cir.

2015) (quoting *Ctr. for Bio-Ethical Reform*, 648 F.3d 365, 379 (6th Cir. 2011)). "In determining whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead seek relevant similarity." *Id.* (quoting *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012)).

For this claim, Defendants specifically raise concerns about the similarly situated element. Defendants argue that AFLC has not adequately pled that any similarly situated organization has been or will be treated differently. Defendants explain that

> the relevant respects would be another group for whom a tip has been offered—one that the Attorney General will consider and decide whether to investigate and ultimately prosecute. The AFLC has made *no allegation* that Attorney General will ignore tips about groups with different political views from the AFLC.

(ECF No. 13 Nessel Br. at 25 PageID.166) (italics in original).

AFLC has adequately pled the similarly situated element for an equal protection claim. The premise for Defendants' argument, that the Attorney General will only be investigating hate groups for which it has received a credible tip that the group has committed a crime, relies entirely on facts not pled in the complaint. The complaint does not plead any facts suggesting that Defendants will surveil or investigate groups based only on tips.[9] AFLC pleads that Defendants will surveil and investigate those groups SPLC has identified as hate groups. A reasonable inference from the allegations is that similarly situated groups (other

[9] The discussion about investigating tips occurs in the various documents which Nessel asked the Court to take judicial notice. While the Court takes judicial notice of the existence of the documents, it does not take judicial notice of the contents of the documents.

nonprofit litigation oriented civil rights groups) that are not identified as hate groups by the SPLC will not be surveilled or investigated.

V.

Defendants are not entitled to dismissal of the amended complaint or the claims brought against them. AFLC has established both standing to bring the claims and the ripeness of those claims based on the announcement of the new Policy Directive. Defendants' general disagreement with the scope and nature of their new initiative does not undermine the effect that the announcement of the new policy on AFLC's reputation and activities, as established by the affidavit submitted by AFLC. And, assuming the allegations in the complaint to be true, AFLC has pled sufficient facts to state claims under the First and Fourteenth Amendments.

ORDER

For the reasons provided in the accompanying Opinion, Defendants' motions to dismiss (ECF Nos. 12 and 14) are **DENIED. IT IS SO ORDERED.**

Date: January 15, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge